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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 45

FEDERAL POWER COMMISSION, *Petitioner*,

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and THE CITY OF NEW YORK, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE SOUTHERN CALIFORNIA GAS COMPANY AND SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, AS AMICI CURIAE

W. JAMES MACINTOSH
J. DAVID MANN, JR.
WILLIAM W. ROSS
MORGAN, LEWIS & BOCKIUS
1230 Pennsylvania Building, N. W.
Washington 4, D. C.
and
2107 Fidelity-Philadelphia Trust Building
Philadelphia 9, Pennsylvania

Of Counsel

HARRY P. LETTON, JR.
L. T RICE
HENRY F. LIPPITT, 2nd
Southern California Gas Company

MILFORD SPRINGER
ROBERT M. OLSON, JR.
JOSEPH R. RENSCH
Southern Counties Gas Company of California
810 South Flower Street
Los Angeles 17, California

Attorneys for Amici Curiae

September 20, 1960

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF THE SOUTHERN CALIFORNIA GAS COMPANY AND SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA

The Southern California Gas Company and Southern Counties Gas Company of California respectfully move for leave to file the accompanying brief *amici curiae* in this case. The consent of the petitioner and respondent Consolidated Edison Company have been

obtained. Consents of the other respondents have not been obtained. Notwithstanding objection, movants participated in the court below as *amici curiae*, and in this Court as *amici curiae* in support of the petition for a writ of certiorari.

The movants, as affiliated public utilities, own and operate the largest retail gas distribution system in the United States, serving over 8,000,000 people in Southern California. All of their interstate gas supplies are sold to them for resale and hence are subject to Federal Power Commission certificate and rate jurisdiction.

The movants are directly interested in the case because the misinterpretation of the Natural Gas Act by the Court of Appeals would severely limit the Commission's authority to grant or deny a certificate of public convenience and necessity for the transportation of natural gas in interstate commerce if such gas is not intended for resale. The movants believe that they can demonstrate to the Court that the Act's comprehensive regulatory protection of natural gas distribution companies and their millions of small consumers would be undermined by the decision below—that, in fact, the result of the decision would be to convert a portion of the Act's intended protection of the public into an unintended burden upon the jurisdictional resale customer who must depend upon fully regulated gas service.

Movants as gas distributors serving the nation's largest and fastest growing gas market, believe that they can make a definite contribution to the Court's understanding of certain economic factors which must not be overlooked in reviewing this latest attempt to

evade regulatory control of natural gas moving in interstate commerce.

Respectfully submitted,

W. JAMES MACINTOSH
J. DAVID MANN, JR.
WILLIAM W. ROSS
MORGAN, LEWIS & BOCKIUS
1230 Pennsylvania
Building, N. W.
Washington 4, D. C.
and
2107 Fidelity-Philadelphia
Trust Building
Philadelphia 9, Pennsylvania

Of Counsel

HARRY P. LETTON, JR.
L. T. RICE
HENRY F. LIPPITT, 2nd
Southern California Gas
Company

MILFORD SPRINGER
ROBERT M. OLSON, JR.
JOSEPH R. RENSCH
Southern Counties Gas
Company of California
810 South Flower Street
Los Angeles 17, California

Attorneys for Amici
Curiae

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BRIEF OF THE SOUTHERN CALIFORNIA GAS COMPANY AND SOUTHERN COUNTIES GAS COMPANY OF CALIFORNIA, AMICI CURIAE

INTEREST OF AMICI CURIAE

The interest of the Amici Curiae is set forth in the motion to which the brief is attached.

STATEMENT

Consolidated Edison Company (Con Edison), a gas, electric and steam utility in New York, contracted to buy natural gas from producers in Texas for consumption under its own boilers in New York City. Under the provisions of Section 1(b) of the Natural Gas Act,[1]

[1] 15 U.S.C. § 717-717w.

the Federal Power Commission does not have jurisdiction over such a sale because it is not a sale of gas for resale for ultimate public consumption. Con Edison arranged for transportion of the gas from Texas to New York. Transcontinental Gas Pipe Line Corporation (Transco), the transporting pipeline company, applied to the Federal Power Commission for a certificate of public convenience and necessity to transport the gas in interstate commerce as required under Section 7 of the Act. The Commission denied Transco's application after considering the effect of this and future similar transactions on the price and availability of natural gas generally and its impact upon the existing regulatory pattern; it also considered the desirability of the boiler fuel use to which this gas was destined.

The United States Court of Appeals for the Third Circuit set aside the Commission's order and remanded the case with directions to issue the certificate to Transco. The decision of the Court of Appeals requires the Federal Power Commission to authorize interstate transportation of natural gas purchased at the source for direct consumption, if the transportation is technically and economically feasible, regardless of the consequences of the transaction on the fully regulated gas industry and on other natural gas consumers.

ARGUMENT

The comprehensive brief for the Federal Power Commission demonstrates, we submit, that nothing in the language or legislative history of the Natural Gas Act prohibits the Commission from considering the adverse effect of proposed transportation services on

existing gas consumers and services. Accordingly, this brief will be concerned solely with showing the virtual certainty of injury to the public interest, should the Commission's jurisdiction over interstate transportation services be curtailed by the Third Circuit's decision.

As we shall show, the decision below would permit substantial volumes of an exhaustible natural resource, natural gas, to be transported and sold for industrial purposes outside effective Federal regulatory scrutiny. Large industrial customers would be encouraged to bid up the price of natural gas in the field, and thus to divert essential future supplies of gas from residential and commercial use. The decision would also deprive natural gas pipeline and distribution companies of important load-balancing industrial sales, throwing existing rate structures out of balance to the detriment of millions of small consumers who are dependent for economical service upon a high load factor operation by their suppliers.

Under direct sale-transportation arrangements, such as the proposed service here, the transportation of the gas is subject to regulation, but the purchase and sale of the gas are wholly nonjurisdictional so far as price regulation by the Federal Power Commission is concerned. The producers making direct sales at the wellhead avoid the careful Commission scrutiny of their initial prices which this Court held imperative for jurisdictional sales in the CATCO case (*Atlantic Refining Company* v. *Public Service Commission*, 360 U.S. 378). Nor are they subject to continuing rate jurisdiction applicable to interstate wholesales pursuant to *Phillips Petroleum Co. Wisconsin*, 347 U.S. 672. These factors

provide strong incentives which attract gas producers to this type of transaction.

Thus, the restrictive reading of Section 7 of the Natural Gas Act by the court below would open an "attractive gap" which, in turn, would result in a substantial undoing of the pattern of Commission regulation of the natural gas industry as contemplated by the Act and this Court's decisions in the *CATCO* and *Phillips* cases.

1. THE DECISION BELOW WOULD OPEN A GAP IN THE SYSTEM OF NATURAL GAS REGULATION ADOPTED BY CONGRESS, WITH RESULTING DETRIMENT TO ULTIMATE CONSUMERS.

Under this Court's decisions interpreting and applying the system of regulation provided by the Natural Gas Act,[2] there could be no substantial gap in the system of regulation governing the natural gas industry since the Federal Power Commission was authorized to regulate all phases of natural gas transportation and wholesales in interstate commerce, while the state regulatory bodies were or could be authorized to regulate the production of gas and the local distribution and retail sale of gas. The decision below, however, would produce a substantial hiatus in this scheme of regulation since it permits a type of interstate transaction having a definite impact on the public as a whole which neither the Commission nor the state could effectively regulate.

The decision, as the Commission's brief makes clear, deprives the Commission of the power even to consider

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[2] *Phillips Petroleum Co.* v. *Wisconsin*; 347 U.S. 672; *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464; *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581; *Panhandle Eastern Pipe Line Co.* v. *P.S.C. of Indiana*, 332 U.S. 507, among many others.

the adverse impact of interstate transportation services on jurisdictional gas sales and service. Under this limited reading of Section 7 of the Act, producers and major industrial concerns would be able to avoid effective federal regulation of their interstate direct sale transactions and, by so doing, could undermine the effectiveness of federal controls over interstate sales for resale.

At the same time, consumer state regulatory bodies would find it difficult if not impossible to regulate the field purchases of gas in the producing states. Furthermore, consumer state regulatory commissions—assuming they had the statutory authority to regulate the various aspects of such transactions at all[3]—could not be expected to understand and certainly would not be governed by the need to avoid injury to *interstate* markets and the *national* public interest, which the Natural Gas Act was enacted to prevent. Thus, the restrictive interpretation of the Federal Power Commission's certificate authority by the court below virtually immunizes transactions of the type here at issue from any effective regulation, state or federal.

The court below, by interpreting Section 7 divorced from policies and purposes of the Natural Gas Act as a whole, has deprived the Commission of a basic regulatory tool essential to the protection of existing consumers. This gap in effective regulation—never in-

[3] The California Supreme Court has recently ruled that sales of gas may be made to selected customers in the service area of certificated gas utilities with immunity from California Public Utilities Commission regulation if there is no dedication to public utility service by the seller. *Richfield Oil Corp.* v. *Public Utilities Comm.*, 54 Adv. Cal. 363.

tended by Congress—should be firmly closed by this Court.

2. THE RESTRICTIVE VIEW OF SECTION 7 OF THE NATURAL GAS ACT TAKEN BY THE COURT BELOW WOULD HAVE A SERIOUS ADVERSE IMPACT ON THE REGULATED GAS INDUSTRY AND ITS CONSUMERS.

(a) The Decision Would Permit Substantial Volumes of Natural Gas to be Sold and Transported in Interstate Commerce Outside Federal Regulatory Scrutiny, and Thus Deplete Gas Supplies Available for Existing Consumers.

Since the protection of gas consumers from the loss incident to the abandonment or termination of gas service was one of the paramount purposes of the Natural Gas Act, *Sunray Mid-Continent Oil Co.*, v. *FPC*, 364 U.S. 137, 143, 147, plainly the possibility of an unnecessarily rapid exhaustion of gas reserves should be considered in determining the public convenience and necessity.[4]

The limited supply of gas presently available to residential and other small consumers would be impaired by rubber stamp approval of transportation arrangements designed primarily to avoid Federal regulation of field prices. Gas supplies would be earmarked for specific large industrial consumers rather than being available to all classes of pipeline and distribution company consumers. The effect of the Transco-Con Edison type of transportation agreement diverting large quantities of gas for exclusive use as boiler fuel, free from Commission price regulation, would necessarily hasten the depletion of existing gas reserves on

[4] See *Sunray Mid-Continent Oil Company* v. *FPC*, 239 F. 2d 97 (10th Cir., 1956); reversed on other grounds; 353 U.S. 944 (1957); *J. M. Huber Corp.* v. *FPC*, 236 F. 2d 550 (3rd Cir., 1956); *cert. den.* 352 U.S. 97 (1957); *Saturn Oil & Gas Company* v. *FPC*, 250 F. 2d 61 (10th Cir., 1957); *cert. den.* 355 U.S. 956 (1958).

which consumers must depend for future gas services.[5]

The Commission was fully justified in concluding, therefore, that the arrangement proposed by Transco and Con Edison could jeopardize gas supply and service to existing jurisdictional consumers.

(b) The Decision Would Unnecessarily Accelerate the Rise in Field Prices of Natural Gas.

As this Court is well aware, development of an effective regulatory program for independent gas producers, in the face of an unprecedented demand for natural gas, has created difficult problems for the Commission. The decision below will greatly aggravate those problems by permitting large industrial consumers to obtain interstate gas supplies free of effective Commission regulation. This will in turn inevitably increase the gas costs of pipeline suppliers of distribution companies, and the rates paid by ultimate consumers of such companies.

Southern California Gas Company and Southern Counties Gas Company of California (Southern California Companies) are affiliated public utilities, owning and operating the largest natural gas distribution system in the United States. They distribute natural gas through nearly 2½ million meters to a population of about 8 million people in the southern portion of California.

The Southern California Companies, apart from size, are typical of the approximately 200 "straight" nat-

[5] The reserve life index of recoverable natural gas in the United States declined from 28.9 years in 1949 to 21.1 years in 1959. 1955 *Gas Facts*, American Gas Association, p. 13; *AGA Monthly*, Apr. 1960, page 4. The decrease in a ten-year period of 27% in the gas reserve life index surely has a bearing on the "public convenience and necessity."

ural gas distributors[6] throughout the United States. These straight natural gas companies perform the bulk of the nation's business in buying gas—usually at the city border, but often some distance away—carrying it to the individual distribution centers to be served, and then distributing it through the gas mains which underlie almost every city in the United States.

At the present time, the Southern California Companies' interstate gas purchase costs exceed $180 million a year. The gas, all resold in California, is delivered to them at the California-Arizona border at rates subject to the Federal Power Commission's regulatory jurisdiction. Since the initiation of this out-of-state service in 1947, the price of this gas has more than doubled. The Southern California Companies and their consumers are today paying $40,000,000 more a year for gas than the same volumes of gas cost them *as recently as 1957*. This price increase stems primarily from the bidding up of field prices.

This Court is aware from the records in the recent CATCO and Transco-Seaboard cases (*Atlantic Refining Co.* v. *P.S.C. of New York*, 360 U.S. 378 and *United Gas Improvement Co.* v. *FPC*, 361 U.S. 195) that competition by pipeline companies to acquire new supplies of gas has exerted strong, upward pressure on prices. The Commission pointed out here that multiple bidding activity by large industrial users of gas would only further "increase the price for natural gas." (R. 175). Since such sales would be exempt from the Commission's rate jurisdiction and since the demand for nat-

[6] Those companies selling only gas as distinguished from combination companies, selling both gas and electricity, such as Con Edison. Less than 25% of the nation's gas service is supplied by combination gas and electric companies.

ural gas exceeds the supply, many producers would hold their gas for direct sale only to such large industrial companies, or to pipelines willing and able to pay the prices offered by large industrial purchasers. Inevitably, natural gas field prices—applicable to all gas sales—would be driven to even higher levels than exist today. Since under the Act the Commission may not require producers to sell gas to interstate pipeline companies for resale, it would be powerless to deal with the problem of pyramiding field prices aggravated by transactions of this type. *Atlantic Refining Co.* v. *P.S.C. of New York*, 360 U.S. 378, 387-388.

This problem is not hypothetical or *sui generis*. Southern California Edison Company (California Edison), a large California electric utility and a principal industrial customer of the Southern California Companies, has attempted to purchase quantities of boiler fuel gas from areas now supplying the systems of the Southern California Companies.[7] The inevitable result of California Edison's competitive bidding for a gas supply to serve the same market load is an unnecessary increase in field prices.

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[7] In one case (*El Paso Natural Gas Company*, Docket No. G-13862, Examiners' decision, February 26, 1959), El Paso, the Southern California Companies' supplier, was required to outbid California Edison for supplies of gas in the Aneth field, thus increasing El Paso's gas costs. In another (*Transwestern Pipeline Co.*, Docket No. G-14871, Examiner's decision July 1, 1959), a prospective supplier of the Southern California Companies was simliarly required to outbid California Edison for gas supplies. California Edison reportedly is now working on an arrangement whereby Tennessee Gas Transmission Company, a major interstate pipeline company, would transport large volumes of gas, to be purchased by California Edison, through a pipeline running from Texas to Southern California by way of Mexico. *Business Week*, July 9, 1960, p. 30; *Oil and Gas Journal*, July 25, 1960, p. 131; *New York Times*, July 20, 1960.

The Commission's undoubted power under Section 7 to condition or control initial prices in jurisdictional sales to pipelines (CATCO, *supra*, 360 U.S. at 391) cannot alone assure consumers adequate supplies at reasonable prices if industrial consumers are free to make wholly unregulated interstate purchases. As Commissioner Kline stated, concurring in the imposition of a price condition in a recent Section 7 order (*Peoples Gulf Coast Natural Gas Pipe Line Company*, Docket Nos. G-19086, et al., July 29, 1960):

> Although I feel we must take this action in order to comply with the holding of the Supreme Court in the *CATCO* case, I am seriously concerned with the effect which our action will have on the flow of gas to the jurisdictional domestic and commercial customers served by interstate pipelines. The 18¢ price at which we are conditioning this sale is considerably below the prices paid by certain large industrial customers not subject to our jurisdiction who purchase gas and transport it in interstate pipelines. We have no jurisdiction over the prices which such large customers pay for this gas and the probable consequence of our action here will be to divert all the remaining gas from the domestic and commercial market to the industrial market. Several years ago Florida Power and Light Company made many large purchases at 19.5¢ per Mcf in Starr, Jim Hogg, Jim Wells, Kennedy and Cleberg Counties in Railroad District No. 4 and has been transporting this gas for industrial use in Florida. Consolidated Edison of New York has purchase large quantities of gas at 19.25¢ per Mcf in Duvall and Bee Counties in Texas Railroad Districts 4 and 2, respectively, for use for industrial purposes in the State of New York. This Commission declined to issue a certificate for the transportation of this gas, which decision was based in part upon the effect which the purchase of the gas would have upon the prices charged by producers selling gas in interstate commerce subject

to our jurisdiction. However, we were reversed by the Circuit Court of Appeals for the Third Circuit in this matter and if that decision remains law we are powerless to prevent such purchases.

It follows that the arrangement here rejected by the Commission could have an immediate, concrete effect of increasing gas prices paid by gas distributor suppliers and thus by gas consumers. Since the prime purpose of the Natural Gas Act is consumer protection against excessive prices, the Commission, in applying Section 7, cannot be prohibited from considering the inevitable impact of large scale, unregulated field purchases on the gas markets supplying existing consumers.

(c) The Decision Would Destroy the Basis for Economical Operation of Regulated Gas Systems By Encouraging Diversion of Load-Balancing, Off-Peak Sales to Unregulated Markets, and Sharply Increase Costs Borne By Existing Consumers.

There is a large demand for gas for space heating in winter months which is not balanced by equivalent demands during the remainder of the year. Pipeline capacity built solely to satisfy winter demands would not be used during much of the rest of the year, and the result would be a substantial increase in the cost of transporting and distributing gas.[8] Pipeline companies and gas distributors meet this problem to a great extent by large interruptible sales to industrial customers during off-peak periods. These off-peak sales greatly benefit residential and other small consumers

[8] In Southern California, 99% of all residential and commercial customers use gas for space heating. Ninety per cent of the homes use gas for cooking, and about 98% use it for water heating. The variation in such a residential and commercial load may be six or seven to one between summer and winter.

by absorbing some of the capital costs which must be incurred by the pipeline companies and distributors in order for them to be able to meet winter heating demands. However, if the decision below stands, straight gas distributors are threatened with the loss of such load-balancing, interruptible industrial sales,[9] and the imposition of additional fixed costs on the millions of ultimate consumers using gas for residential and commercial purposes.

The economic importance to distributors of load-balancing industrial sales is shown quite clearly in this record by Con Edison's proposed arrangement with Transco. To provide Con Edison with necessary winter supply for its utility gas sales, the arrangement calls for discontinuance of the transportation of the boiler-fuel gas (which Con Edison cannot resell) for as many as 60 days a year, during which time Transco will sell 50,000 Mcf per day on a firm basis to Con Edison for general system use, including resale (R. 166). Such a device is necessary only because Con Edison wishes to avoid the Commission's jurisdiction over the producers' sales to Con Edison while at the same time retaining the load-balancing features necessary to it as an operating utility.

If large industrial users can, as here, purchase their gas supplies in the field free of any effective Federal Power Commission regulation, the ability of those distributors who are not themselves large consumers of gas to retain their load-balancing industrial market in any volume is highly questionable. The impact on gas

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[9] A combination gas and electric company, like Con Edison, would not suffer this loss when it makes the direct purchase of gas for its own use because its own boiler fuel requirements provide a "built-in" balancing load under its own control.

consumer service and rates, presently based on a pattern of regulated sales, would be immediate and severe.

The inability of distributors to make the most efficient use of their facilities because of the loss of off peak industrial sales must, by the simple laws of economics, increase the unit costs borne by residential and commercial consumers. Major gas distribution systems have been built on a combination of "firm" residential and commercial, and "interruptible" industrial, business. Hence, the economy and practicability of the elaborate system of gas mains, services, meters, and related facilities underlying our cities may be placed in question if seasonal utilization is cut sharply through loss of industrial customers.

If such a consideration is not relevant to the "public convenience and necessity," then it is difficult to understand what concrete meaning can be assigned that standard.

CONCLUSION

For these reasons, as well as the reasons stated in the Commission's brief, we urge that the Commission's order be affirmed.

Respectfully submitted,

W. JAMES MACINTOSH
J. DAVID MANN, JR.
WILLIAM W. ROSS
MORGAN, LEWIS & BOCKIUS
1230 Pennsylvania
Building, N. W.
Washington 4, D. C.
and
2107 Fidelity-Philadelphia
Trust Building
Philadelphia 9, Pennsylvania

Of Counsel

HARRY P. LETTON, JR.
L. T. RICE
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Company

MILFORD SPRINGER
ROBERT M. OLSON, JR.
JOSEPH R. RENSCH
Southern Counties Gas
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810 South Flower Street
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